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Filing date: **03/20/2009**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91186473
Party	Plaintiff Apex, LLC
Correspondence Address	Andrew Gates Apex, LLC 100 Main St. Pawtucket, RI 02860 UNITED STATES theapexcompanies@gmail.com
Submission	Opposition/Response to Motion
Filer's Name	Brent R. Canning
Filer's e-mail	theapexcompanies@gmail.com
Signature	/Brent R. Canning/
Date	03/20/2009
Attachments	Opposition Brief to Pavers' Motion to Compel 3.20.09.pdf (7 pages)(26392 bytes) Exhibit A - Oppos to Motion to Compel.PDF (3 pages)(1192041 bytes) Exhibit B - Oppos to Motion to Compel.pdf (7 pages)(28692 bytes) Exhibit B Signature Page - Oppos to Motion to Compel.PDF (3 pages)(816884 bytes) Exhibit C - Oppos to Motion to Compel.pdf (16 pages)(57553 bytes) Exhibit C Signature Page - Oppos to Motion to Compel.PDF (3 pages)(947839 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

APEX, LLC	:	
Opposer,	:	
v.	:	Opposition No. 91186473
	:	Serial No. 77/243,433
APEX PAVERS, INC	:	Mark: APEX PAVERS (and design)
Applicant	:	Filing Date: July 31, 2007

**OPPOSER’S BRIEF IN SUPPORT OF ITS OPPOSITION
TO APPLICANT’S MOTION TO COMPEL**

I. INTRODUCTION

The Board should deny Applicant’s Motion to Compel. It was filed prematurely and it has been mooted by Opposer’s supplemental discovery responses. In short, it is a perfect example of a discovery dispute that easily could have been avoided if Applicant’s counsel had simply worked cooperatively with opposing counsel to resolve some scheduling difficulties Opposer was facing as a result of the hiring of new in-house counsel.

Because Applicant’s counsel refused to grant Opposer *any* extension of time to respond to its discovery requests, Opposer was forced to serve responses that were incomplete. And now, having created this discovery problem by behaving unreasonably, Applicant wants to complain to the Board that Opposer is violating its discovery obligations. The accusation is false and unfair.

II. FACTS

A. The Opposition Proceeding

1. Opposer, Apex, LLC, is the owner of a family of federally registered and common law Apex marks (and pyramid designs) that are used in connection with a variety of goods and services, including retail for, among other things, home and garden goods (including outdoor

products related to pools, patios, and backyards) and for real estate construction, management and development services (including remodeling and design). Opposer, through its predecessors and their affiliates (“Apex”) has made use of its APEX Marks since the 1920s. A number of Opposer’s federally registered marks are incontestable.

2. Applicant filed an application on July 31, 2007 to federally register “Apex Pavers” with a pyramid design.

3. According to the application, Applicant uses its Apex Pavers Mark in connection with the construction of swimming pools; paving contractor services; installation of driveways, patios, walkways, pool decks, remodeled pools, walls, and spa additions.

4. Because Opposer for many years has been in the business of providing goods and services in related fields and has used its Apex Marks in connection with those goods and services, it filed an opposition to Applicant’s application.

B. Applicant’s Discovery Requests

5. On January 5, 2009, Applicant served Opposer with a first request for admissions, a first set of interrogatories, and a first request for production. (Two days earlier, Applicant had filed and served a Motion to Amend its application.)

6. On January 23, 2009, on her first day of work, Opposer’s new in-house trademark counsel, Gwenn Roos, Esq., contacted Applicant’s counsel and requested an extension of time to respond to Applicant’s discovery requests (and the Motion to Amend). Attorney Roos explained that she had just joined the company and that the employee she needed to assist her in preparing responses was travelling for two weeks.

7. Applicant's counsel refused to consent to the extension and did not propose any alternative -- a shorter extension for example. The reasons for this uncooperative behavior are unclear.

8. Because of Applicant's intransigence, On February 10, 2009, Opposer was forced to serve its responses (admittedly incomplete in some instances due to the timeframe imposed) to the interrogatories and document requests. Despite the burden of the timeframe, Opposer also provided responses to the request for admissions.

9. On February 20, 2009, Applicant's counsel wrote to Opposer and complained about the incomplete discovery answers and the objections interposed by counsel. Applicant had steadfastly refused to grant any extension to Opposer and the letter failed to offer a suggestion for a resolution. This, apparently, is what Applicant's counsel is relying upon when she states in her Brief that she made a "good faith" attempt to resolve the discovery dispute.

10. The February 20, 2009 letter does not acknowledge that the unwillingness to grant Opposer any extension was the exclusive reason for the so-called discovery dispute. The letter also contains a number of allegations with which Opposer disagrees.

11. On February 26, 2009, the undersigned attorney, Brent Canning, contacted Applicant's counsel on behalf of Opposer in an attempt to address and resolve Applicant's concerns. Opposer's counsel explained that he was just joining Opposer and requested another week or so to review the supplemental discovery responses that Applicant was preparing. He committed to getting Applicant's counsel supplemental responses.

12. The following day, for reasons that are unclear, Applicant's counsel once again refused to extend any courtesy to opposing counsel. And once again, Applicant's counsel offered

no compromise position – despite stating in her February 20, 2009 letter that she was interested in working toward a reasonable resolution.

13. At no time did Applicant's counsel articulate any reason why she was unable to behave more cooperatively. She did not identify any emergent circumstances and Opposer's counsel are unaware of any.

15. Nevertheless, the next week, on March 6, Applicant filed the instance Motion to Compel. The Motion does not acknowledge how Applicant's uncooperative behavior has created this so-called dispute.

16. On March 15, 2009, Opposer served supplemental discovery responses to Applicant's first set of interrogatories and first request for production by electronic mail and overnight delivery. (The supplemental discovery responses are attached as Exhibits A and B.) In addition, Opposer provided Applicant with copies of responsive documents showing Opposer's use of its Apex Marks in connection with its retail (home, patio and garden, among other things) and real estate services.

17. Opposer's counsel also sent Applicant's counsel a cover letter and specifically asked to speak with Applicant's counsel to resolve the dispute without involving the Board. (The cover letter is attached as Exhibit C.)

18. Applicant's counsel ignored the request.

19. Opposer's counsel telephoned Applicant's counsel's office on the afternoon of March 20, 2009 but was informed that she was not available.

III. ARGUMENT

Opposer respectfully requests that Applicant's Motion be denied as premature (because it was filed without negotiating with opposing counsel in good faith) and moot (because Applicant

has supplemented its discovery responses and stands ready to address any outstanding discovery concerns).

The arguments advanced in Applicant's brief are largely beside the point. For instance, Applicant spends pages advocating the unremarkable proposition that Applicant is entitled to conduct discovery. No one is claiming otherwise. What Opposer is claiming is that it needed a reasonable period of time to properly respond to Applicant's discovery requests. For whatever reason, Applicant and its counsel have been unwilling to consent to *any* extensions. It is that uncooperative behavior that resulted in the initial discovery responses that led Applicant's counsel to file this Motion. The Motion is now moot as Opposer's counsel has now provided Supplemental Responses.

Applicant also asks the Board to treat any of Opposer's objections as waived because the initial discovery responses were served one day late. Given that Opposer's counsel specifically explained that it could not provide substantive responses in the time demanded by Applicant's counsel, the argument seems churlish. Opposer was faced with unreasonable counsel who would not consent to any extension and so it provided what information it could and interposed its objections to preserve them until it could provide more substantive responses. In addition, as set forth in Opposer's counsel's January 10, 2009 cover letter (attached as Exhibit D to Applicant's Brief), the responses were served one day late because of a computer error incurred by Opposer's outside counsel.

Ultimately, this discovery dispute has been mooted because Opposer has, in fact, supplemented its discovery responses with substantive answers and it has provided responsive documents to Applicant. Opposer believes that the supplemental responses resolve Applicant's

concerns and, to the extent any remain, Opposer is ready to discuss those concerns in good faith and provide further supplementation if appropriate.

IV. CONCLUSION

For the foregoing reasons, Applicant's Motion should be denied.

Respectfully Submitted,

APEX, LLC

By Its Attorney:

/Brent R. Canning/

Brent R. Canning

Apex, LLC

100 Main Street

Pawtucket, Rhode Island 02860

Tel: (401) 729-7219

Fax: (401) 729-7215

E-Mail: bcanning@theapexcompanies.com

Dated: March 20, 2008

CERTIFICATE OF ELECTRONIC MAILING

I hereby certify that the foregoing Opposition Brief is being submitted electronically through the Trademark Trial and Appeal Board's ESTTA System on March 20, 2009.

/Brent R. Canning/
Brent R. Canning

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition Brief is being deposited with the U.S. Postal Service with sufficient postage as first class mail March 20, 2009 in an envelope addressed to Applicant's attorney of record at the following address:

Leslie A. Burgk
Leslie A. Burgk, P.A.
900 East Ocean Blvd, Suite D-130
Stuart FL 34994

/Brent R. Canning/
Brent R. Canning

EXHIBIT A



100 MAIN STREET PAWTUCKET, RHODE ISLAND 02860

401 723.6108

March 18, 2009

Leslie A. Burgk
Leslie A. Burgk, P.A.
900 East Ocean Blvd., Suite D-130
Stuart, FL 34994

Re: Apex, LLC
Vs. Apex Pavers, Inc.
Opposition No. 91186473

Dear Leslie:

As you know from our telephone conversation at the very end of February, I have just joined The Apex Companies as in-house counsel. I have now had the opportunity to review this file and am writing to you concerning a variety of outstanding matters in the hopes of setting the record straight and moving this proceeding forward in a more productive fashion.

First, I read your Motion to Compel. I do not see the need for such a strident tone. As you know from your discussions with Gwenn Roos and me, Apex has hired new in-house counsel and this has contributed to the delay in providing you some of the information you requested. There is no grand scheme to deprive your client of its discovery rights.


Just so the record is reasonably clear, on January 3 and 5 you served by mail, a motion to amend, requests for admissions, interrogatories, and document requests. Gwenn contacted you in January on her first day of work here and asked you for an extension to respond to your motion and to answer your discovery requests. You refused. You also refused my request for an extension when I called you in late February and explained that I was beginning work here on March 1. You denied my request even though in correspondence to John Ottaviani, Esq. you stated that you were open to granting a reasonable extension. If you were genuinely interested in cooperating with us on discovery deadlines, I have not seen any evidence of it. That is a shame because had you cooperated in either instance, I am confident that we could have addressed your discovery requests in a timely manner and could avoided this unnecessary motion practice.

Nevertheless, it makes little sense at this point to debate the merits of your strategy or the claims in your motion or your correspondence -- other than to say that we disagree with many of the allegations. Instead, in the interest of moving forward, I am enclosing supplemental responses to your client's first set of interrogatories, supplemental responses to your first request for production, and documents showing my client's use of the Apex mark in connection with its retail services and in connection with its real estate services. I am hopeful this will address the concerns in your Motion to Compel so that you will either withdraw it or, alternatively, so that we can execute an appropriate stipulation to address any remaining issues. I am available to discuss this matter for the rest of the week. Please call me at your convenience before the close of business on Friday, March 20, 2009 (or let me know by email when you are available to talk) so that we can resolve this issue without involving the TTAB and can thereby avoid further motion practice.

Second, along with this letter and the supplemental discovery responses, you will also find my client's first set of interrogatories and first request for production to Apex Pavers, Inc.

Finally, your February 20, 2009 letter to John Ottaviani, Esq. expresses a willingness to work with Apex to resolve this matter. So far I have seen nothing to suggest that is the case. My understanding is that Andrew Gates proposed a settlement offer during your discovery conference but you rejected it. You made no counter-proposal at that time and have not offered one since. There are a variety of creative ways that would allow our clients to co-exist. If you wish to explore those avenues or to propose a solution, please let me know. If not, we will simply move forward with this opposition, as we have serious concerns about the validity of your client's application and the confusingly similar mark and design.

Very truly yours,



Brent R. Canning
Apex, LLC

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

APEX, LLC	:	
	:	
Opposer,	:	
	:	Opposition No. 91186473
v.	:	Serial No. 77/243,433
	:	Mark: APEX PAVERS (and design)
APEX PAVERS INC	:	Filing Date: July 31, 2007
	:	
Applicant	:	

**OPPOSER’S FIRST SUPPLEMENTAL RESPONSES TO APPLICANT’S FIRST
REQUESTS FOR PRODUCTION OF DOCUMENTS**

Pursuant to Rule 34 of the Federal Rules of Civil Procedure and TMBP §§ 405 and 406, the Opposer, Apex, LLC (“Opposer”) hereby submits its First Supplemental Responses and Objections to Applicant’s First Request for Production of Documents (“Applicant’s First Request” or “Request” or “Requests”) as follows:

GENERAL OBJECTIONS

1. Opposer objects to the definitions and instructions contained in Applicant’s First Request to the extent that those definitions and instructions differ from or seek to alter the applicable United States Patent and Trademark Office Rules of Practice, Trademark Trial and Appeal Board Manual of Procedure, and the Federal Rules of Civil Procedure.
2. Opposer’s answers and objections are made to the best of its present knowledge, information and belief. Said answers and objections are at all times subject to such additional or different information that discovery or further investigation may disclose.
3. Opposer objects to any request which seeks information and/or identification of

documents and/or production of documents that embody material that is private, business confidential, proprietary, trade secret, attorney-client privileged, or attorney work product, on the grounds that such information and documents are privileged or confidential, and the disclosure of such confidential commercial information would be damaging to Opposer.

4. Opposer objects to any Request for the Production of Documents to the extent they seek to require Opposer to respond on behalf of any entity other than Opposer or to the extent Applicant seeks information not within the possession, custody, or control of Opposer or information regarding issues that are proper subjects for experts, which have not yet been designated and Opposer objects to the Requests to the extent that they seek an expert opinion.
5. Opposer objects to any Request for the Production of Documents that is overly broad, irrelevant, vague and unduly burdensome; that goes beyond the allegations of any claim or defense asserted herein; that is not appropriately limited to subjects, times and areas relevant to this proceeding; that requires legal conclusions; or that is not calculated to lead to the discovery of admissible evidence.
6. Opposer reserves the right to provide supplemental responses as additional information becomes available or is made known to Opposer.
7. Opposer objects to the request for the Production of Documents to the extent they seek information of matters of public record or information that is equally available to Applicant.
8. Opposer objects generally and individually to the request for the Production of Documents on the grounds and to the extent that they assume facts not in evidence or otherwise are erroneous.

9. Opposer objects to the request for the Production of Documents to the extent they attempt to shift to Opposer the burden of reviewing documents to determine whether any responsive information exists and compiling responsive information if located.
10. Opposer objects to the request for the Production of Documents to the extent they are not reasonably limited in time.
11. Opposer does not represent that there exist any documents responsive to any particular request, and Opposer's statement that documents responsive to a particular request will be produced does not mean that any such documents in fact exist or that Opposer has possession, custody or control over said document(s). In addition, Opposer reserves the right to produce only the responsive portions of a document when that document also contains non-responsive, confidential, privileged, proprietary or personal information, or other information not relevant to the subject matter of this action.
12. Opposer incorporates by reference the foregoing Objections in response to each Request whether or not set forth at length below.

Subject to these "General Objections" and the limitations which are outlined with regard to each specifically numbered Response, Opposer responds to Applicant's Request for Production of Documents without waiver of, and with the preservation of the following:

1. The right to object on the grounds of competency, privilege, relevance, materiality or any other proper ground, to the use of any material produced herein, in whole or in part, for any purpose, in any subsequent proceeding in this action or in any other action;

2. The right to object on any and all proper grounds, at any time, to other requests, or other discovery procedures involving or relating to the subject matter of the requests responded to herein; and

3. The right, at any time, to revise, correct, modify, supplement or clarify any of the answers provided herein;

All of Opposer's responses are made subject to the foregoing objections, comments and qualifications

**RESPONSES AND SPECIAL OBJECTIONS TO
REQUESTS FOR PRODUCTION OF DOCUMENTS**

Subject to and without waiving the foregoing General Objections, Opposer hereby responds to and/or specifically objects to the following requests for production of documents:

1. All documents disclosed in Opposer's Initial Disclosure pursuant to Fed. R. Civ. P. 26(a)(1).

RESPONSE: See General Objections. Without waiving the foregoing objections, Opposer objects to Request No. 1 on the grounds that it is overly broad and unduly burdensome. Applicant purports to require the identification of all documents disclosed in Opposer's Initial Disclosure, and therefore, seeks information set forth in thousands of documents. At Applicant's own expense and during Opposer's normal business hours, Opposer shall make available for Applicant's inspection all relevant non-privileged documents and, at Applicant's own expense and during normal business hours of Opposer, Applicant may make copies of the documents relevant to this request.

SUPPLEMENTAL RESPONSE: Without waiving the foregoing objections, representative, responsive, non-privileged documents will be produced.

2. All documents relating to Registrant's first use of the marks in the United States.

RESPONSE: See General Objections. Without waiving the foregoing objections, Opposer objects to Request No. 2 on the grounds that it is irrelevant, unduly burdensome and not likely to lead to admissible evidence. Applicant seeks information set forth in thousands of documents or documents that may not be in the possession of Opposer. In addition, since Applicant's alleged first use is in 2006, the time frame is irrelevant. At Applicant's own expense and during Opposer's normal business hours, Opposer shall make available for Applicant's inspection all relevant non privileged documents and, at Applicant's own expense and during normal business hours of Opposer, Applicant may make copies of the documents relevant to this request.

3. All documents relating to any licenses, assignments, consent to use, consent to register or other agreements relating to the marks.

RESPONSE: See General Objections. Without waiving the foregoing objections, Opposer objects to this Request because it seeks information that is irrelevant to the present opposition proceeding and seeks documents and information which are subject to the Attorney-client privilege and/or are the subject of confidentiality obligations. Opposer also objects to the extent that certain requested documents

are publicly available. At Applicant's own expense and during Opposer's normal business hours, Opposer shall make available for Applicant's inspection relevant non privileged documents and, at Applicant's own expense and during normal business hours of Opposer, Applicant may make copies of such documents relevant to this request.

4. Representative samples of Opposer's advertisements and promotional materials for the Opposer's real estate development and construction services and real estate management services used in connection with the marks.

RESPONSE: See General Objections. Without waiving the foregoing objections, Opposer will provide a Supplemental Response in which it will produce representative samples of specimens of its advertisements and promotional materials regarding use of the marks in real estate and construction services.

SUPPLEMENTAL RESPONSE: Without waiving the foregoing objections, representative, responsive, non-privileged documents will be produced.

5. All documents relating to any evidence of actual or potential confusion involving Applicant's mark and Opposer's marks.

RESPONSE: See General Objections. Without waiving the foregoing objections, at Applicant's own expense and during Opposer's normal business hours, Opposer shall make available for Applicant's inspection relevant non privileged documents and, at Applicant's own expense and during normal business hours of Opposer, Applicant may make copies of such documents relevant to this request.

SUPPLEMENTAL RESPONSE: Opposer is not aware of such documents but

reserves the right to supplement in the future as discovery continues.

6. All documents related to the sales of Opposer's products bearing the marks and Opposer's services provided in connection with the marks.

RESPONSE: See General Objections. Without waiving the foregoing objections, Opposer objects to this Request because it seeks information that is irrelevant to the present opposition proceeding and is overly broad and unduly burdensome. In addition, since Applicant's alleged first use is in 2006, the time frame is also overly broad and unduly burdensome. Applicant seeks information set forth in thousands of documents. At Applicant's own expense and during Opposer's normal business hours, Opposer shall make available for Applicant's inspection all relevant non-privileged documents and, at Applicant's own expense and during normal business hours of Opposer, Applicant may make copies of the documents relevant to this request.

SUPPLEMENTAL RESPONSE: Without waiving the foregoing objections, representative, responsive, non-privileged documents will be produced.

7. All documents or things identified in response to Applicant's First Request for Interrogatories, and not otherwise produced in response to Requests 1-6.

RESPONSE: See General Objections. Without waiving the foregoing objections, Opposer objects to this Request because it seeks information that is irrelevant to the present opposition proceeding and seeks documents and information which are subject to the Attorney-client privilege and/or are the subject of confidentiality

EXHIBIT B
(Signature Page)

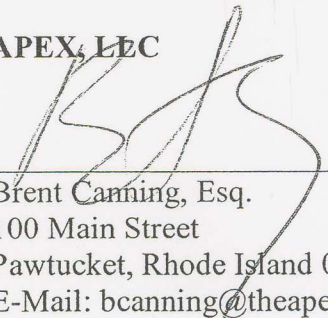
obligations. Further, the request is overly broad and unduly burdensome.

Applicant seeks information set forth in thousands of documents. At Applicant's own expense and during Opposer's normal business hours, Opposer shall make available for Applicant's inspection all relevant non privileged documents and Applicant, through its representatives, may view such documents during normal business hours of Opposer and may make copies of such documents relevant to this request.

SUPPLEMENTAL RESPONSE: Without waiving the foregoing objections or the objections to the interrogatories, representative, responsive, non-privileged documents will be produced.

Respectfully Submitted,

APEX, LLC

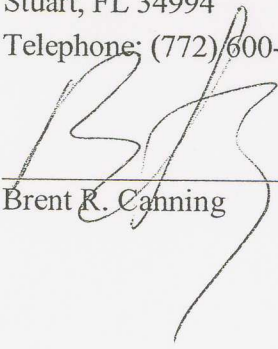


Brent Canning, Esq.
100 Main Street
Pawtucket, Rhode Island 02860
E-Mail: bcanning@theapexcompanies.com

CERTIFICATE OF SERVICE

I hereby certify that, the foregoing "Opposer Apex, LLC's First Supplemental Responses to Applicant's Initial Requests for Production" is being served via First Class mail, postage prepaid, on March ____, 2009, to:

Leslie A. Burgk, PA.
900 East Ocean Blvd, Suite D-130
Stuart, FL 34994
Telephone: (772) 600-2677



Brent R. Canning

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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Opposer,	:	
	:	Opposition No. 91186473
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	:	Mark: APEX PAVERS (and design)
APEX PAVERS INC	:	Filing Date: July 31, 2007
	:	
Applicant	:	

**OPPOSER’S FIRST SUPPLEMENTAL RESPONSES TO APPLICANT’S FIRST
REQUESTS FOR INTERROGATORIES**

Pursuant to Rules 33 of the Federal Rules of Civil Procedure and TMBP §§ 405 and 406, the Opposer, Apex, LLC (“Opposer”) hereby responds and objects to Applicant’s First Request for Interrogatories (“Applicant’s First Request” or “Request” or “Requests”) as follows:

GENERAL OBJECTIONS

1. Opposer objects to the definitions and instructions contained in Applicant’s First Request to the extent that those definitions and instructions differ from or seek to alter the applicable United States Patent and Trademark Office Rules of Practice, Trademark Trial and Appeal Board Manual of Procedure, and the Federal Rules of Civil Procedure.
2. Opposer’s answers and objections are made to the best of its present knowledge, information and belief. Said answers and objections are at all times subject to such additional or different information that discovery or further investigation may disclose.
3. Opposer objects to any interrogatory which seeks information and/or

identification of documents and/or production of documents that embody material that is private, business confidential, proprietary, trade secret, attorney-client privileged, attorney work product, on the ground that such information and documents are privileged or confidential, and the disclosure of such confidential commercial information would be damaging to Opposer.

4. Opposer objects to any interrogatory to the extent Applicant seeks to require Opposer to respond on behalf of any entity other than Opposer or to the extent Applicant seeks information not within the possession, custody, or control of Opposer or information regarding issues that are proper subjects for experts, which have not yet been designated and Opposer objects to the Requests to the extent that they seek an expert opinion.
5. Opposer objects to any interrogatory that is overly broad, irrelevant, vague and unduly burdensome; that goes beyond the allegations of any claim or defense asserted herein; that is not appropriately limited to subjects, times and areas relevant to this proceeding; that requires legal conclusions; and that is not calculated to lead to the discovery of admissible evidence.
6. Opposer reserves the right to provide supplemental responses as additional information becomes available or is made known to Opposer.
7. Opposer objects to the Request for Interrogatories to the extent they seek information of matters of public record or information that is equally available to Applicant.
8. Opposer objects generally and individually to the Request for Interrogatories on the grounds and to the extent that they assume facts not in evidence or otherwise are erroneous.

9. Opposer objects to the Request for Interrogatories to the extent they attempt to shift to Opposer the burden of reviewing documents to determine whether any responsive information exists and compiling responsive information if located.
10. Opposer objects to the Request for Interrogatories to the extent they are not reasonably limited in time.
11. Opposer incorporates by reference the foregoing Objections in response to each Request whether or not set forth at length below.

Subject to these “General Objections” and the limitations which are outlined with regard to each specifically numbered Response, Opposer responds to Applicant’s First Request for Interrogatories without waiver of, and with the preservation of the following:

1. The right to object on the grounds of competency, privilege, relevance, materiality or any other proper ground, to the use of any material produced herein, in whole or in part, for any purpose, in any subsequent proceeding in this action or in any other action;
2. The right to object on any and all proper grounds, at any time, to other requests, or other discovery procedures involving or relating to the subject matter of the requests responded to herein; and
3. The right, at any time, to revise, correct, modify, supplement or clarify any of the answers provided herein.

All of Opposer’s responses are made subject to the foregoing objections, comments and qualifications

RESPONSES AND SPECIAL OBJECTIONS TO
REQUESTS FOR INTERROGATORIES

Subject to and without waiving the foregoing General Objections, Opposer hereby responds to and/or specifically objects to the following interrogatories:

1. Please identify all individuals, corporations, limited liability companies, partnerships or any other entities that are using or holding themselves out to be using the Opposer's marks.

RESPONSE: See General Objections. Without waiving the foregoing objections, Opposer objects as to relevancy. Opposer also objects as the definitions of "Opposer's marks" and "using or holding themselves out" are unclear and ambiguous and the Request is therefore overly broad and not likely to lead to the discovery of admissible evidence. Without waiving the foregoing, Opposer will provide names of individuals and entities using Opposer's marks for relevant purposes for the appropriate time frame in a supplemental response.

SUPPLEMENTAL RESPONSE: Without waiving the foregoing objections, relevant affiliated entities that are using Opposer's Marks with permission include Apex At Home, LLC, Apex Advantage, LLC, Apex Development Company, LLC, and Apex Tire & Service Center, LLC. In addition, there are various consent agreements in place with third parties.

2. For each individual, corporation, limited liability company, partnership, and other entity identified above, please list their names, addresses (in the case of individuals), principal places of business, officers, directors, agents, managerial employees, and a description of the business activity of each.

RESPONSE: See General Objections. Opposer also objects to the relevancy and repeats the objections made in its Response to Request No. 1. In addition

this Request is overly broad and burdensome. Further, much of the information sought is available in public records and is available to Applicant to find without burdening the Opposer. Without waiving the foregoing, Opposer will provide relevant contact information for the individuals and entities identified in Opposer's Response to Request No. 1 in a supplemental response.

SUPPLEMENTAL RESPONSE: Each of the entities identified in response to Interrogatory No. 1 is headquartered at 100 Main Street, Pawtucket, Rhode Island 02860 except for Apex Tire & Service Center, LLC which is located at 1 School Street, Pawtucket, RI 02860. With the exception of Apex At Home, LLC, each of the foregoing entities is managed by Andrew Gates. Michael Dvorin manages Apex At Home, LLC.

Apex At Home, LLC is in the general retail business, selling a wide variety of goods and merchandise including without limitation merchandise related to outdoor living including without limitation garden and patio.

Apex Advantage, LLC is in the business of providing advertising, design, marketing and consulting services and custom finishing, screen printing, and embroidery, among other services.

Apex Development, LLC is a real estate company involved in development, construction and property management services, among other things.

Apex Tire & Service Center, LLC is an automotive company. It provides various services relating to automotive parts, electronics, repair and

maintenance and sells a variety of goods and merchandise, among other things.

3. Please identify Opposer's predecessors and affiliates, as referenced in Opposer's Notice of Opposition.

RESPONSE: See General Objections. Without waiving the foregoing objections, Opposer objects to this Request as it is overly broad and burdensome and not likely to lead to the admissibility of evidence. Opposer also objects to the extent Applicant is attempting inappropriately to shift to Opposer the burden of reviewing documents to determine whether any responsive information exists and to compile whatever responsive information might be located. Opposer and its predecessors and their affiliates ("Apex") has been in business for over eighty years and has had a number of predecessors and affiliates. Without waiving the foregoing, Opposer will provide names of Apex's predecessors and their affiliates for the time frame immediately preceding Applicant's first date of use in a supplemental response.

SUPPLEMENTAL RESPONSE: Without waiving the foregoing objections, see Opposer's Supplemental Response to Interrogatory No. 1 for the time frame immediately preceding Applicant's first date of use.

4. Please identify any written licensing agreement, assignment agreements, consent to use, consent to register, other similar agreements and/or terms of any verbal

agreements between the Opposer and any other individuals, corporations, limited liability companies, partnerships or other entities relating to the marks.

RESPONSE: See General Objections. Without waiving the foregoing objections, Opposer objects to this Request as it is overly broad and burdensome and seeks information not likely to lead to the admissibility of evidence. Opposer also objects to the extent Applicant is attempting inappropriately to shift to Opposer the burden of reviewing documents to determine whether any responsive information exists and to compile whatever responsive information might be located. In addition, Opposer objects to this Request because it seeks information that is subject to the Attorney-client privilege and/or are the subject of confidentiality obligations.

SUPPLEMENTAL RESPONSE: Without waiving the foregoing objections, Opposer states that there are licensing agreements in place among the entities identified in the Supplemental Response to Interrogatory No. 1 that relate to the use of Opposer's Marks. In addition there are a number of consent agreements with third parties.

5. Please state whether the Opposer has used or is currently using any other marks, other than the marks listed in Opposer's Notice of Opposition, which incorporate the mark APEX and/or a pyramid-shaped design, and; for each such mark, please identify the mark and describe the goods and/or services that are offered in connection with the marks.

RESPONSE: See General Objections. In addition, Opposer objects to this Request because it seeks information that is irrelevant to the present opposition.

Without waiving the foregoing objections, Apex has used and is currently using the mark APEX and/or a pyramid-shaped design for a variety of goods and services.

SUPPLEMENTAL RESPONSE: Opposer states that it is using the mark APEX in combination with a wide variety of words as marks including, Apex Express, Apex Search, Apex Parking, Apex Construction, Apex Development, Apex Green, Apex At Home, Apex Properties, Apex Property Management, Apex Advantage, Apex Real Estate, Apex Difference, and Apex Experience, among others. In addition Opposer is using the mark APEX COMPANIES, for real estate development in Class 37 and real estate management services in Class 36. The federal registration for that mark issued on January 6, 2009. Opposer is evaluating the potential for consumer confusion between Applicant's Mark and Opposer's other Apex Marks.

6. Please list all products that bear the Opposer's Marks

RESPONSE: See General Objections. Without waiving the foregoing objections, Opposer objects to this Request as it is overly broad and burdensome and not likely to lead to the admissibility of evidence. Opposer also objects to the extent Applicant is attempting inappropriately to shift to Opposer the burden of reviewing documents to determine whether any responsive information exists and to compile whatever responsive information might be located. Apex has been in business for many years and has used its marks on or in connection with a wide variety of goods and services. There are thousands of documents evidencing the use of Opposer's marks over the years. Without waiving the foregoing

objections, Opposer will make the relevant information available for Applicant's review at Applicant's expense and during Opposer's normal business hours.

SUPPLEMENTAL RESPONSE: Without waiving the foregoing objections, Opposer states that Apex has used the Apex Marks on signs, brochures, posters, buildings, pamphlets, clothing, trucks, trailers, memorabilia, manufactured goods, novelty items as well as a variety of other things and in general media advertising (newspaper, radio, television, internet) for many years to promote various products and services and that it has used the Marks in connection with the sale of outdoor related goods and merchandise, including without limitation pavers, mulch, grass seed, tools and other related outdoor products, furniture and equipment.

7. Please fully list all of Opposer's goods and/or services that you are claiming are likely to be confused with Applicant's services.

RESPONSE: See General Objections. Without waiving the foregoing objections, Opposer objects to this Request as it is overly broad and burdensome and not likely to lead to the admissibility of evidence. Opposer also objects to the extent Applicant is attempting inappropriately to shift to Opposer the burden of reviewing documents to determine whether any responsive information exists and to compile whatever responsive information might be located. Apex has been in business for many years and has used its marks on or in connection with a wide variety of goods and services. There are thousands of documents evidencing the use of Opposer's marks over the years. Notwithstanding the foregoing objections, Opposer will make the relevant information available for Applicant's review at

Applicant's expense and during Opposer's normal business hours.

SUPPLEMENTAL RESPONSE: Without waiving the foregoing objections, Opposer contends that Applicant's sale of pavers and other products and the provision of related renovation and construction services for buildings, commercial real estate, homes, pools, patios, and driveways will lead to confusion in the mind of the average consumer with Apex's sale of related goods and merchandise and Apex's use of the Apex Marks in connection with its property construction, management, and development services.

8. With regard to the goods and services identified in Interrogatory Request No. 7, please fully explain the basis for why you believe there is a likelihood of confusion between those goods and/or services and the Applicant's services.

RESPONSE: See General Objections and objections and Response to Request No.7. In addition, Request No. 7 assumes a fact not in evidence, that Opposer believes there is a likelihood of confusion between Applicant's goods and services and the Applicant's services. Without waiving the foregoing objections, Opposer believes there would be a likelihood of confusion were Applicant's application to be approved, because Applicant's APEX PAVERS mark (with and without the design) is very similar in appearance and commercial impression to Opposer's marks, which have been in use for many years, on a variety of goods and services, and because the goods and services listed in Applicant's application are closely related to those of Apex, in particular to Apex's retail, real estate development and construction services and real estate management business.

SUPPLEMENTAL RESPONSE: Without waiving the foregoing objections, see

Supplemental Response to Interrogatory No. 7. Opposer has a long history of providing outdoor related goods and merchandise and the installation and servicing of such, including patio, outdoor cooking and garden items and merchandise, to the general public. Furthermore, Opposer provides property management, construction, and renovation services. In addition, Opposer states that the probability of confusion is enhanced because the two marks have an identical spelling of the word “Apex,” they sound the same, and the look and feel of the two marks is virtually identical, including Applicant’s use of a pyramid shape.

9. For **each** mark (as described in paragraph 3 of the Definitions and Construction section), please state:
- a. The date of Opposer’s services were first rendered in connection with the mark;
 - b. A description of the services involved in the first rendering of services in connection with the mark;
 - c. The place where the first services were rendered in connection with the mark;
 - d. The customer whom the first services were rendered in connection with the mark;
 - e. The price charged for the first services rendered in connection with the mark;
 - f. The date the Opposer’s services were first rendered in **interstate** commerce in connection with the mark;
 - g. A description of the services involved in the first rendering of services in **interstate** commerce in connection with the mark;
 - h. The place where the first services were rendered in **interstate** commerce in

connection with the mark;

- i. The customer to whom the first services were rendered in **interstate commerce** in connection with the mark;
- j. The price charged for the first services rendered in **interstate commerce** in connection with the mark.

RESPONSE: See General Objections. In addition, Opposer objects to this Request because it seeks information that is irrelevant to the present opposition proceeding and the Request is overly burdensome. Opposer also objects to the extent Applicant is attempting inappropriately to shift to Opposer the burden of reviewing documents to determine whether any responsive information exists and to compile whatever responsive information might be located. Opposer also objects to the extent that Applicant's alleged first date of use is 2006 and since Apex's use precedes Applicant's use Request No. 9 is irrelevant. Apex has been using the mark for many years prior to 2006 and Opposer's marks have become well-known in the relevant industries in which Apex has been doing business. Opposer's registrations as well as the relevant files are of public record at the United States Patent and Trademark Office. Further, the information requested is contained in thousands of documents which are stored in Apex's offices/warehouse.

SUPPLEMENTAL RESPONSE: Without waiving the foregoing objections, Opposer states that it is relying on its incontestable federally registered marks and accordingly this interrogatory is seeking information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence relative to those marks. Relative to the common law marks and the other marks that

Opposer may rely upon, it will research the necessary information to prepare a supplemental answer, if and as applicable.

10. For **each mark** (as described in paragraph 3 of the Definition and Construction section), please state the entire geographic area where Opposer's goods and/or services are marketed and/or sold.

RESPONSE: See General Objections and objections in No. 9. In addition, Opposer objects to this Request because it seeks information that is irrelevant to the present opposition proceeding. Without waiving the foregoing objections, Opposer will make the relevant non privileged information available for Applicant's review at Applicant's expense and during Opposer's normal business hours.

SUPPLEMENTAL RESPONSE: Without waiving the foregoing objections, the geographic range includes the United States and abroad.

11. For **each mark** (as described in paragraph 3 of the Definitions and Construction section), please state the channels of trade wherein Opposer's goods and/or services are marketed and/or sold.

RESPONSE: See General Objections and objections in No. 9. In addition, Opposer objects to this Request because it seeks information that is irrelevant to the present opposition proceeding. Without waiving the foregoing objections, Opposer will make the relevant non privileged information available for Applicant's review at Applicant's expense and during Opposer's normal business hours.

SUPPLEMENTAL RESPONSE: Without waiving the foregoing objections,

Opposer's goods and services are marketed to ordinary consumers from the general public, businesses, and non-profits.

12. Please describe and identify all forms of advertising, publicity, catalogs, sales manuals and other materials that have been used by Opposer in promoting the sales of its products and/or services under each mark since its first use of each mark and specify for each:
- a. The periodical (e.g., newspaper or magazine), tradeshow publication, catalog, or other media (e.g., radio or television) or form (e.g., billboard, pamphlet, brochure or the like), print, verbal, electronic or otherwise, in which it was placed or ran.
 - b. The dates on which it was placed or ran and/or the duration of its use;
 - c. The amounts expended thereon; and
 - d. The geographic area it was distributed.

If a promotional piece:

- e. The numbers prepared or printed and the date of each printed;
- f. To whom and by what means the item was distributed and the duration of its use;
- g. The amounts expended thereon; and
- h. The geographic area it was distributed.

RESPONSE: See General Objections. In addition, Opposer objects to this Request because it seeks information that is irrelevant to the present opposition proceeding. Further, the Request is overly broad and unduly burdensome.

Opposer also objects to the extent Applicant is attempting inappropriately to shift

to Opposer the burden of reviewing documents to determine whether any responsive information exists and to compile whatever responsive information might be located. Opposer also objects to the extent that Applicant's alleged first date of use is 2006 and since Apex's use precedes Applicant's use the request is irrelevant. Without waiving the foregoing objections, Opposer will provide representative specimens in a supplemental response.

SUPPLEMENTAL RESPONSE: Without waiving the foregoing objections, Opposer over time has advertised its goods and services in New England and across the United States through the general media, including billboards, newspaper, television and radio advertisements, through websites on the internet, and through signs, posters, direct mail, buildings, brochures and pamphlets, among other things. Opposer could not possibly identify each such promotion or advertisement over its many decades in business or calculate the total amount spent on advertising. Nevertheless, Opposer estimates that it has spent over \$ *redacted* since 1995.

13. Please state your annual sales for the past five (5) years and break sales down by the goods and services attributable to the sales.

RESPONSE: See General Objections. Without waiving the foregoing objections, Opposer objects to this Request because it seeks information that is irrelevant to the present opposition proceeding and contains confidential and proprietary information.

14. State with specificity all known incidents of actual confusion, actual mistake or

actual deception on the part of any member of the public, concerning Applicant's mark and Opposer's marks. Include with your answer the date(s) of such incidents, the names and addresses of those persons actually confused by the co-existence of the marks. Include all instances of misdirected mail, misdirected inquiries, misdirected invoices and/or misdirected deliveries, if any. Identify any documents related to the foregoing.

RESPONSE: See General Objections and objections to No. 8. In addition, this Request seeks information already sought in Request No. 8.

SUPPLEMENTAL RESPONSE: Without waiving the foregoing objections, Opposer is not aware of any such incidents and reserves the right to supplement this response.

15. Please fully explain the basis for your claim that the Apex mark and pyramid shape have become famous.

RESPONSE: See General Objections. Without waiving the foregoing objections, Opposer objects to this Request because it seeks information that is irrelevant to the present opposition proceeding and seeks documents and information which are subject to the Attorney-client privilege. Further, the Request is overly broad and unduly burdensome. Opposer also objects to the extent Applicant is attempting inappropriately to shift to Opposer the burden of reviewing documents to determine whether any responsive information exists and to compile whatever responsive information might be located. Without waiving the foregoing objections, Opposer will provide relevant information in a supplemental response.

EXHIBIT C
(Signature Page)

SUPPLEMENTAL RESPONSE: Without waiving the foregoing objections, Opposer states that its use of a pyramid including on its buildings is well known. In particular its signature headquarters building in Pawtucket is visible from Route 95 and has been the subject of various news articles and stories as well as being promoted in advertising and marketing. Since 1995, Apex has spent over redacted on its advertising and marketing.

16. Please identify all evidence which supports your claim that the Apex mark and pyramid shape have become famous.

RESPONSE: See General Objections and the objections and Response to Request No. 15.

SUPPLEMENTAL RESPONSE: Without waiving the foregoing objections, Opposer states that its use of a pyramid including on its buildings is well known. In particular its signature headquarters building in Pawtucket is visible from Route 95 and has been the subject of various news articles and stories as well as being promoted in advertising and marketing. Since 1995, Apex has spent over redacted on its advertising and marketing.

Respectfully Submitted,

APEX, LLC

By: 

Andrew Gates, President
100 Main Street
Pawtucket, Rhode Island 02860
E-Mail: theapexcompanies@gmail.com

AS TO OBJECTIONS:

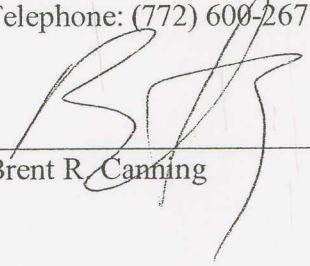


Brent R. Canning, Esq.
Apex, LLC
100 Main Street
Pawtucket, RI 02860
Telephone: (401) 721-7219

CERTIFICATE OF SERVICE

I hereby certify that, the foregoing "Opposer Apex, LLC's First Supplemental Responses to Applicant's Initial Requests for Interrogatories" is being served via UPS Next Day service on the March 18, 2009, to:

Leslie A. Burgk, PA.
900 East Ocean Blvd, Suite D-130
Stuart, FL 34994
Telephone: (772) 600-2677



Brent R. Canning